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No. 27963

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVE, FRANK G. E. TUCKER, DISTRICT ATTORNEY

Petitioner,

vs.

THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT

Respondents.

REPLY BRIEF OF PETITIONER

ROBERT L. RUSSEL
District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
the Ninth Judicial District of Colorado

MILTON K. BLAKEY
Chief Deputy District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for
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TABLE OF AUTHORITY

PAGE (S)					2,3,5,						1,5,9	
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CASES	Bell	Furman v.	Gregg v. 428	Jurek	Lockett	Proffitt 428	Roberts,	Roberts, 428	Woodson 428		Colorado Sect	Ohio
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STATEMENT OF THE ISSUES

IS THE COLORADO DEATH PENALTY STATUTE WHICH PROVIDES FOR ADMISSION OF EVIDENCE AND JURY DETERMINATION OF AGGRAVATING AND MITIGATING FACTORS UNCONSTITUTIONAL FOR TOO NARROWLY PERMITTING CONSIDERATION OF MITIGATING FACTORS?

STATEMENT OF THE CASI

Judicial Information 16-11-103 Theodore felony death Ninth Н Statutes, the Criminal the charging Class of for Q imposition Direct and Revised Murder, C-1616) in Court Ø Colorado $p_{\overline{\lambda}}$ Degre 916 No conviction District Action П 26, First imprisonment, October (Criminal with the amended npon in Bundy punishable filed District as life Robert 1973, or

Ø for Wa cause held Hearing probable Bundy Preliminary Robert found Court Theodore Q 1977, the 1977, Defendant, 2 and 4 9 April April the On on ordered and trial held and

court State and the United Eighth Motion asking the the .03, Q filed of of Consideration, violation Constitution 6 Defendant Statute in the from Revised the unconstitutional, 1977, t t Penalty Colorado Amendments 16, Death May that On the ı. Fourteenth find amended Strike t

Defendant' Ø brief granted and tutional Court argument the unconsti the 1977, considered statute 27, December the Court holding on The and motions, counsel

satisfy held Order 11 to Д rigid at and (Memorandum Opinion 100 Opinion 13 plan its Memorandum sentencing standards." i, Statutory Court constitutional The "Colorado's

Original Rule Ø granted this filed Court Petitioner Ø thi 978, 1977, 2 January 30, December ono and Cause Proceeding Show 2

time on granted Si of decis Wa extension Court Petitioner the reply to the Due its considerable 8 and file 97 reply Н .978, 3, t t July ٦ to 1978, . 27 Ø 1978, after decided April 25, 5, July Respondents, on \vdash July Ohio brief until Н > unti their Lockett Petitioner granted filed in

recaptured from Lamm Extradition escaped Florida Richard Was and Bundy, of Governor charges Askew • 977 Robert Н Governor 31 and state Theodore December commenced faces t t requisition on Mou endant, been Jail he have def where County The his proceedings Florida Garfield sent has in

and custody Colorado in Mou 4 noi set 1.8 peen defendant has date The trial no

SUMMARY OF ARGUMENT

N AGGRAVATION AND MITIGATION,
S ADEQUATE STANDARDS AGAINST
O MEASURE THE DEFENDANT"S
AND CHARACTER THUS PREVENTING
RY AND CAPRICIOUS APPLICATION
DEATH PENALTY. PREVENTING APPLICATION STATUTE HEAR PENALTY OL JURY DEATH THE DEATH COLORADO ALLOWS RECORD AND ARBITRARY OF THE DEA NI TO PROVIDES WHICH WHICH

ARGUMENT

the Ct. have ct. mitigating 978 Q of Such ŝ pha 2 Supreme which tion S Ct. 97 9 second 9 imposi offender statutes and S 2 s 32 96 S D the aggravating for 280, D S the 1 the trial 428 penalty providing $p\lambda$ ŝ Louisiana and unconstitutional D siana bifurcated 428 theoffense death statute Loui ina, with > Carol Roberts the mandatory the > Ø specifically Colorado Roberts establishes both North held Harry to peen Stanilaus the relevant >1 Unlike and Woodson deals penalty consistently • 1933, (1977) 16) which factors -3001 (19 Court, (1976)death of

that S. Ct., discretion 92 408 U.S. 238, unbridled jury the Georgia, from the in Furman v. procedure removes condemmed (1972)

Supreme analyzed statutes and approved them as satisfying the Eighth and Fourteenth Amendments. the several opinions since Furman, In mandates of has

1978) U.S. (July and Jurek v. out are Lockett v. Ohio 2950 (1976), to point (1976), Proffit 3229 23CRL (1976)looked -2960 153, 96 S. Ct. 2909 supra, U.S. The most recent decisions S. Ct. inadequacy of the Ohio statute. Ct. Ohio, Ohio 262, 96 S. 242, 96 | court in Lockett v. and Bell Florida, 428 U.S. 428 U.S. 428 U.S. 23CRL 3215,

satisfied the mandates statute which enumerates ten possible aggravating factors broad statutory aggravating factors be found The court In Gregg v. Georgia, the court reviewed the approved the with Court had enumerate mitigating factors. along recommended evidence Supreme guidance and direction. introduction of mitigating sentence could be Georgia the of the not that because does that one a death

i.t reputation adopt a similar interpretation admissable a mitigating a mitigating factor if an interpretation of the mitigating factors would and and argument, this requirement would be It is only character record Colorado jury to find Ιţ and that the death penalty can be imposed. οĘ without character avoid the death penalty. open introduction found this court of necessary for a evidence is factor permitting wide Should all aggravating to virtually evidence is not factor

of 4 factors penalty consideration that factors Was factors finds death statute mitigating aggravating aggravating jury, the t t Florida court application of the six eight lists of the the advisory vote outweigh limit Florida, and enumerates for limited specifically > provided factors after statute Proffit is court mitigating H court, factors not In Florida the does examined if the these which the but

Second, drawn 1.8 it. otherwise be First, capacity. should sentence. OL statute. distinctions statutory advisory death Colorado an factor, important in of the the except mitigating and application and jury statute clear ď ď١ þλ TWO this bar of applied a finding does not not

ф TO T into -H court of Of back factors introduction jury the us meaningful what lead statutory mitigating (jury's) that surely the and court's therefore, in and would latitude intelligent the suggest, aggravating or affect wide impossible uncertainty. make ı. may would Would here that instructions Н permitting pre-Furman otherwise statutory evidence

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the allow effect to would statute evidence Colorado introduction of the of Interpretation in latitude result broad same

establish Was rather Texas not but procedure examined in Jurek v. did factors, statute and mitigating Texas interrogatories: The different. aggravating Texas three $_{
m The}$ considerably of jury a list the

expectation would that was committed defendant another t of the defendeceased was the reasonable or deceased of the de with the conduct the of whether the ed the death the and death deliberately the caused that

violence the that of vi a probability criminal acts ther there is would commit result; (2) whether t fendant would

threat continuing ď constitute and would society; (3) if ra

conduct if deceased was provocation, at 2955 the whether sed by the evidence, whendant in killing the of in response to the perceased." 96 S. Ct. raised by defendant onable in re unreasonable the by the any,

individual the jury by the interpreted to the 276 question brought before at relating 2628, ช that u.s. circumstance held 42 simply adduced" second mitigating court the pe can The court, "whatever defendant Texas

court safeguards state liberal and standards to looked adequate court the find Again to pretati

unconstitutional > 1978) Bell ct. and 3, ŝ it JulyOhio, 1978), statute and held (decided >1 3, Lockett July Cr.L3229 (decided opinions Ohio death penalty 23 Cr. L 3215, recent 76-6513, most 23 No. The the 76-6997, ct. examined ŝ Ohio No.

in holding consideration the character death". that than offense defendant's concurred precluded less the sentence Justices of ಹ it i οĘ circumstances as ď aspect 3220 for four invalid at basis any of Crl.3215, plurality statute was the factor, ď as of proffers any Ohio, tigating ď and Ohio Here defendant record the mi Lockett d that as

statute and the amended, Colorado admissable as 1973, the in evidence factors 16-11-103, the mitigating consider Statutes, the then of Revised Let us applicability provides: Colorado

the sentence s sentencing finding that the impose : if the or on the defendant if esults in a verdict of offense: not shall the results of court time death hearing the

offense, which this participation to minor as constitute eighteen; or ate wrongfulness to significantly conduct substantial prosecution; o prosecution; in the offerna a เร t t appreciate wro his duress as y another but hi minor, although n the but h impaired or to such to pr to prosecution; under unusual unusual not such age He was a principal is committed by another s relatively minor, al defense SO to a defense as under the capacity to of or but not was under , although requirements conduct Was constitute impaired, a defense He w He his duress the at t (a) (b) of 1 Was Was (d (0)40

conduct in the course of the commission of offense for which he was convicted would create a grave risk of the commission of the onother. person. another cause, or (e) his the

factor his defendant' grave absence of prior criminal for and upon his a mitigating Q and offense conduct" create the education bearing relevant to of the Would his itself to another person" of age, as commission or relevant appreciate wrongfulness cause, His in and of are the factors including eighteen. convicted would "the certainly 1. S that age these death under life, forsee While a11 of causing ٦. ا in are t t All which he was to if he experience "capacity character activity, ability of only risk

i, been out criteria follows has set are after one of as These set Code ď penalty the Ohio Revised provides murder. death aggravated statute the of Ohio imposition of of 2929.04 The guilty section found for

unless indictor for the death section 2941.14 of is proved beyond offense. penalty is prectice following is space following in the following beyond imposing death a capital the deat! for the Criteria ď murder and indictment ţ doubt: for "§2929.04 Crited imprisonment for (A) Imposition of ment pursuant Revised Code, Code, more aggravated reasonable or ment one in

petition name person general Or offices. election of his cate, or of the presidency, vice president-elect of the president-elect or of the United States or of the governor-elect or lieutenant governor-elect of this state, or of For purposes of this state, or of according according the form. States ense was the assassination of nt of the United States or per succession to the presidency, writeany of the foregoing officof this division, a person he has been nominated for e hire. have or fhe to law to a primary qeneral campaigns a primary or the according t ballot in Was if he offense offense the in according to or petitions or election, candidate placed on The

or purpose trial, or the apprehension, offense commi for committed another punnishment for another offers offense was

- offender Code. the purpose or the conduct convicted attempt to kill victim was engaged offender ill another, at bar, or t ourse of cond knew as Revised the offense, while the facility the Revisor OL ion 2921.01 of the Revi thas previously been of which the gist was the or attempt to kill anot e was a la offender course ling of the Was involving the purposeful killing to kill two or more þλ attempt to ki the offense ce persons by the offense of the off committed detention the o officer whorand and either ill two or more The victim of the Was Q 40 section in or he offense was prisoner in ed in section he offender loffense of the offense of t killing or o offense o enforcement committed defined his law ful in
- the indictment condition fleeing offender of death when following burglary. re of the division (preponderance) able doubt, the deder is precluded circumstances of commit, or for attempting the and the more attempting to commercer committing or atter in in the character, obbery, or aggravated ss of whether one or r circumstances listed specified عباعد a reasonable d aggravated murdonthe nate of one or more prepondence more kidnapping, rape, atted robbery, or agarantless of whether the history, nder, one or m committing, att beyond offender, of Regardless immediately for aggravating (A) of this established considering proved aggravated (B) Regard evidence: The penalty offense commit a 1 (2) Was
- facilitated Or induced offense the victim of
- been Was though the have offender coercion, or strong provocation e was primarily the product of deficiency, t to establish would offense wethat the ider's psychosis or mental condition is insufficient use of insanity." the fact unlikely that but for the f (2) It is unlike committed, but for under duress, coe (3) The offense v offender's defense such

three murder individual participation here, does these factors are the aggravating Was felony The likewise seen killing capacity Q readily be the offense. in Η though the complicitor defendant nor his minor. actions. can οĘ the participation was offender. As it to the nature even of of his ď account death penalty who the seven of the wrongfulness one of take that which pertain age upon the first do not or his the the 80 crime, The avoid consider focused factors foreseeable appreciate factors cannot are not i,

held court the limitation, this to regard In

mitigating the some the purposes he sentencing 3221. of ם נו that be speds death of defendant's comparatively minor role offense, or age, would generalist. would generally not to affect the senter. I. 3215 at 3221. proof to cause the defor mitigating it i direct pro that determined of intended relevant Cr.L. absence such, it i The g = defendant decision. **1.** only

Justice Mr Mr. even more pungent. of opinions concurring are White the respect, Justice this Blackmun and Mr. In Blackmun Justice

require, degree course if any reason character of A defendant idence, if any the course or fired, in the c no · · A dele fatal or would be part of f indant's participation the homicide and the use minor dnu the leading to the homicid the defendant's mens r would be permitted to be available, that he to anticipate that a g that he played only a of events leading to t ď only a leading to 3215, more man ofollow such thority of the d Ohio t t man J.S as

provides which It involvement" case deficiency. the Lockett "minor such in and consideration suffer result not "unforeseeable" does prime Colorado ď obviously the is.

CONCLUSION

application procedures attention particular the not create of Colorado 13 record death penalty to the the "freakish" the as focusing in only when OF broad and case circumstances "character SO OL the guidelines the are 80 "capricious" not that held application the clearly j. the settled clear sentencing body on and and 13 unusual provides "arbitrary its is well offender This for and result. $_{
m I}$ t statute established individual that cruel offense" the risk Will our se of

and Revised constitutional Colorado absolute. that H-8 be made amended submitted should as therefore 1973, case 16-11-103, this 1.8 It is rule Statute the

submitted, Respectfully

(3043)RUSSEL ij. ROBERT

of Colorado for the Colorado for of Co District Attorney Fourth Judicial District Deputy District Attorney Ninth Judicial District

Milton K. Blakey

(2091)

Chief Deputy District Attorney
Fourth Judicial District of Colorado
Deputy District Attorney for the
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Suite 310

Colorado Springs, Colorado 80903

Springs,

8090

CERTIFICATE OF MAILING

certify that I have mailed a copy of the 81611 and the Supreme Court State of Colorado, 2 E. 14th Avenue, Denver, Colorado Glenwood Springs, 81601, Hon. George E. Lohr, District Court Judge, Pitkin foregoing to Kevin O'Reilly, Box 1635, day of July, 1978. County Courthouse, Aspen, CO I hereby JEAN this the

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COLORADO STATE OF THE SUPREME COURT OF THE NI

No. 27963

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVE, FRANK G. E. TUCKER, DISTRICT ATTORNEY

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7

TABLE OF AUTHORITY

PAGE (S)	() 3,5	m		3,4	2,3,5,	3,4					led 1,5,9	9
CASES	Bell v. Ohio	Furman v. Georgia 408 U.S. 238, 92 S. Ct. 2726 (1976)	Gregg v. Georgia 428 U.S. 153, 96 S. Ct. 2909 (1976)	Jurek v. Texas 428 U.S. 262, 96 S. Ct. 2950 (1976)	Lockett v. Ohio 73 Cr.L. 3215	Proffitt v. Florida 428 U.S. 242, 96 S. Ct. 2960 (1976)	Roberts, Harry v. Louisiana U.S. v. 97 S. Ct. 1993 (1977)	Roberts, Stanislaus v. Louisiana 428, U.S. 325, 96 S. Ct. 3001 (1976)	Woodson v. North Carolina 428 U.S. 280, 96 S. Ct. 2978 (1976)	STATUTES	Colorado Revised Statutes, 1973, as amended Section 16-11-103	Ohio Revised Code Section 2929.04

STATEMENT OF THE ISSUES

IS THE COLORADO DEATH PENALTY STATUTE WHICH PROVIDES FOR ADMISSION OF EVIDENCE AND JURY DETERMINATION OF AGGRAVATING AND MITIGATING FACTORS UNCONSTITUTIONAL FOR TOO NARROWLY PERMITTING CONSIDERATION OF MITIGATING FACTORS?

STATEMENT OF THE CASE

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Was for cause held Hearing 0 probabl Bundy, Preliminary found Theodore Robert Court Q 1977, the Defendant, 1977 2 and 9 4 April April the S on ordered and trial held and

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Defendant and briefs granted unconstitutional Court argument theconsidered the 977, Н statute 27, December the Court holding on The and motions, counsel

satisfy held: P.11 Order to rigid at and (Memorandum Opinion t00 Opinion is plan Memorandum sentencing standards." its in Statutory Court constitutional The "Colorado's

Original Rule Ø granted this filed Court Petitioner this ∞ 97 \vdash 1977 2 annary 30, December 5 on and Cause On ceeding Show Pro t t

time granted Si of S deci Wa extension Court Petitioner the replyţ the Due ts considerable 978, -1 and file Н reply ∞ 3, to 97 JulyН t 1978, 7 Ø 1978, 2 decided after April 25, 15, July Respondents, on July 01 brief Ohio until until their Petitioner Lock granted filed in

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and custody Colorado in NOM not set ı. been defendant has date The trial no

SUMMARY OF ARGUMENT

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AGGRAVATION AND MITIGATION, ADEQUATE STANDARDS AGAINST MEASURE THE DEFENDANT"S ND CHARACTER THUS PREVENTING Y AND CAPRICIOUS APPLICATION HEAR EVI-MITIGATION, STATUTE PENALTY TO JURY DEATH PENALTY. DEATH THE COLORADO RECORD AND ARBITRARY DENCE IN PROVIDES WHICH TO NI THE WHICH THE OF

ARGUMENT

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discretion that s. 238, 92 jury the unbridled 408 U.S. Georgia, from the Furman V. procedure removes in condemmed (1972)

Court Supreme and approved them as satisfying the Eighth and Fourteenth Amendments. Furman, the several opinions since statutes analyzed In mandates of has

3, 1978) U.S the (July 2950 (1976), to point out The most recent decisions are Lockett v. Ohio and Jurek Gregg Proffit 3229 supra, looked to 23CRL (1976), (1976)2960 Ct. 2909 U.S. Ct. inadequacy of the Ohio statute. ct. Ohio, 242, 96 S. Ohio U.S. 153, 96 S. 96 S. | | 262, The court in Lockett and Bell 428 U.S. 428 U.S. 428 23CRL 3215, Florida, Georgia

requirement satisfied the mandates statute which enumerates ten possible aggravating factors Court had approved broad factors be found The court In Gregg v. Georgia, the court reviewed the the with enumerate mitigating factors. along the statutory aggravating recommended evidence Georgia Supreme direction. introduction of mitigating could be the sentence guidance and not that because οĘ that one a death for

it and argument, this requirement would be satisfied adopt a similar interpretation a mitigating a mitigating factor if an broad interpretation of the mitigating factors would and It is only character record is not necessary for a Colorado jury to find It and that the death penalty can be imposed. permitting wide open introduction of without virtually all evidence of character death penalty. is found this court avoid the factor Should aggravating to evidence factor 13

of penalty t factors consideration that factors Was factors finds statute death mitigating aggravating aggravating jury, the to Florida application of court the six of eight and lists the the outweigh the vote limit Florida, enumerates advisory for limited specifically factors > provided In Proffit after statute 1.8 court mitigating factors. Ιţ court, not Florida the examined. does the which these The the but ij.

drawn Second 1.8 it otherwise, be First, should capacity or sentence statute. distinctions statutory advisory death Colorado an factor, important in the jury except the of mitigating and application and statute clear ď ρλ ď١ bar TWO of this applied finding does not between not

go Ø O_L -H into court of factors. back finding introduction jury the us and meaningful what lead statutory mitigating (jury's) that surely the court's therefore, in Would make intelligent latitude the and suggest, affect aggravating or wide impossible uncertainty 1.8 that may would Would permitting here instructions pre-Furman otherwise statutory evidence

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the allow effect to Would statute evidence Colorado of the introduction of Interpretation in latitude result broad same

Was establ rather Texas not · but Jurek did factors, statute in examined and mitigating Texas interrogatories: procedure The different. aggravating Texas three $_{
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- expectation would Was committed defendant another deceased was le reasonable or the the reaso deceased of conduct of the d with the the of the caused the death deliberately and and death whether the that
 - that the deof a probability that criminal acts of vi whether there is lant would commit result; (2) whet fendant

threat continuing ď constitute and would

conduct if Ø provocation, the 2955 deceased whether at the e, w Ct e evidence, killing th to S 96 response deceased." the in } if raised by the defendant in unreasonable the society; (3) if ra þλ any,

individual the jury ρλ before the interpreted the 276 t at relating 2628, question brought as that U.S. circumstance held 42 adduced". simply second mitigating court the þe can The court, "whatever defendant Texas

inter court safeguards state liberal and standards to looked adequate court the find Again to pretation

unconstitutional > 1978) Bell ct. and S $^{\circ}$ ı. July Ohio, 1978), held (decided > and 3, Lockett statute July Cr.L3229 (decided opinions penalty 23 Cr. L 3215, recent 76-6513, death most Ohio 23 No. The the 997, Ct. examined 9-S 9/ Ohio No.

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statute the amended and Colorado admissable as 1973, the in evidence (2) factors 16-11-103, the mitigating consider Statutes, then the of Revised us applicability Let Colorado provides

that sentence sentencing finding the the th on the defendant if the results in a verdict or time of the offerna "(5) The of death hearing the at t

eighteen; οf age the under Was His He

constitute ç wrongfulness conduct significantl to o conform his c law was signif o impaired as t appreciate or to prosecution; under unusual to 80 to of or but not capacity the requirements impaired, but not conduct to a defense his (p)

substantial or 40 o prosecution; in the off as duress and not such ense to pr titute a defense to p He was a principal in committed by another He was under duress, alt constitute (C) (g)

offense, which his participation h not so minor as or to prosecution; his although but defense relatively minor, ď constitute Was Was

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in been out criteria follows after one has set are as of These set Code ď death penalty Ohio Revised statute provides aggravated murder. the the of Ohio of of .04 imposition The guilty 2929 section found for

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for election petition name person or general write-in election. offices States, the ussassination of the United States or persion to the presidency, continuated governor of his or a person hire. the United Stator or lieutenant Q filed a this state, or of the president-elect vice president-elect of the United Sta or of the governor-elect or lieutenant governor-elect of this state, or of a been nominated if he has file the foregoing division, a pe law to P primary e in a primary or general offense was committed for offense was committed for campaigns as a to Ø primary or the in law, or if according succession was t the for any of ses of this if he has b of the ballot he governor or of reasonable doubt (1) The offense the president of j. offense For purposes candidate if laccording to according to or petitions or placed on the or in or election, candidate candidate line the g The in of

or purpose trial, or committed apprehension, offense comm. another of escaping detection, punnishment for anotherthe

purpose Code. convicted conduct attempt the engaged rattempt to kill are, or the to the offense at bar, or the as part of a course of conducroseful killing of or attempt hy the offender. knew as Revised victim was eng the the law while the facility purpose offender has previously been which the gist was t attempt to kill and Ø the Was ill two or more persons by The victim of the offense v specific s committed a detention 2921.01 of officer whom the cand either the vices at the time of t such, and the time of the offender's species the offender's species the offender's species. bar was part or he purposeful or more Was section or a in offender ffense of prior offense o illing of a prisoner ned in sect bar at b. the enforcement killing involving committed The his Was law an (5) of a ful to i, it

indictment condition offender r fleeing when and condit following commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indicate. (preponderance) of while the officommit, or flor attempting doubt, the case sprecluded circumstances character, more of the hether one or rances listed is specified reasonable do is OL committed t aggravated murder the nature and cir the history, chara nature and chistory, char offense was committed itting, attempting to sely after committing one or more prepondence Q committing, at beyond Q offender, established immediately for considering proved evidence: The penalty offense and of

facilitated or induced the offense victim of

peen though the have offender strong provocation of deficiency, to establish product offense w that the the mental insufficient primarily unlikely that the but for the fact or or coercion, condition is income of income is incompared to the condition is income. (2) It is unlill committed, but under duress, offender's The defense such it.

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participation here, last the aggravating does Was felony The seen likewise killing capacity can readily be offense. in individual Τţ the complicitor nor his the though minor actions of the defendant i, Was even nature ď of his As 1. 1. participation account of death penalty offender. who the the wrongfulness one to of take which pertain that the age or his do not SO nodn the the the crime, avoid consider foreseeable focused factors appreciate factors cannot the not in

held court the limitation, this to regard In

three statutory mitigating consideration of a the the the y purposes sheds some sentencing of that in victim.

only if it is
light on one of the the the factors. Similarly, considerated defendant's comparatively minor role in offense, or age, would generally not be as such, to affect the sentence of the sentence of the such, to affect the sentence of the sentence of the such, to affect the sentence of death or direct proof to cause the dea for mitigating purmined that it she of to The absence ant intended is relevant ". . . INE

Justice Mr Mr. of pungent opinions even more are White Justice states Blackmun Mr. and Blackmun Justice

degree acts course if any reason and require defendant force evidence, 11 ttle or no result be fired, contract in the contr character the sentencing consider the my the in in alternative, i Anralist tact, would be of ht's participation homicide and the to adduce evic he had little part follow a proceduralist to does not, in the case oh as Lockett, that the nse minor to rea. dnu the have discretion leading to the homicion the defendant's mens rewould be permitted to be available, that he to anticipate that a g ď only a manageable t he played only events leading to Cr.L. 3215, 3224 defendant's more such Ohio thority the t that man is as

provides which It involvement" such deficiency. Lockett "minor the in consideration result and suffer not "unforeseeable" does prime Colorado ಥ obviously the for is

CONCLUSION

application procedures particular of Colorado record t t the death penalty the "freakish" the as focusing in only when and broad of case circumstances "character SO or the guidelines the 80 are "capricious" not held that application the clearly i.s the settled clear sentencing body on and and "arbitrary", is provides unusual its offender well This for 13 and result. statute It established individual that cruel offense" the will risk onr of

and Colorado Revised constitutional absolute that 1.8 made amended submitted be should as therefore 1973, case Statute 16-11-103, this 18 Ιţ is rule the

submitted Respectfully

t of Colorado y for the of Colorado ROBERT L. RUSSEL (3043)
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CERTIFICATE OF MAILING

80203 copy of the 81611 and the Supreme Court the State of Colorado, 2 E. 14th Avenue, Denver, Colorado foregoing to Kevin O'Reilly, Box 1635, Glenwood Springs, 81601, Hon. George E. Lohr, District Court Judge, Pitkin I hereby certify that I have mailed a day of July, 1978. County Courthouse, Aspen, CO JEH this

Milan (Dagens

COLORADO OF STATE THE COURT OF SUPREME THE NI

27963 No.

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVE, FRANK G. E. TUCKER, DISTRICT ATTORNEY

Petitioner,

VS.

PETITIONER

OF

BRIEF

REPLY

OF THE GEORGE E. E DISTRICT E DISTRICT THE DISTRICT COURT OF STATE OF COLORADO, GE LOHR, AS ONE OF THE D COURT JUDGES OF THE D

Respondents.

Colorado Colorado of ROBERT L. RUSSEL
District Attorney
Fourth Judicial District of C
Deputy District Attorney for
the Ninth Judicial District

Colorado MILTON K. BLAKEY Chief Deputy District Attorney Fourth Judicial District of Colorado Deputy District Attorney for the Ninth Judicial District of Colora

TABLE OF AUTHORITY

PAGE (S)					2,3,5,						6	
闰	S.			4	m	4					5	
AG	3,5	c		3	7	3	7	~ ~	7		1,5,9	9
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CASES Bell v. Ohio		Furman V. Georgia 408 U.S. 238, 92 S. Ct. 2726 (1976) .	Gregg v. Georgia 428 U.S. 153, 96 S. Ct. 2909 (1976) .	Jurek v. Texas 428 U.S. 262, 96 S. Ct. 2950 (1976).	<u>Lockett v. Ohio</u> , 23 Cr.L. 3215	Proffitt v. Florida 428 U.S. 242, 96 S. Ct. 2960 (1976) .	Roberts, Harry v. Louisiana U.S. v. 97 S. Ct. 1993 (1977)	Roberts, Stanislaus v. Louisiana 428, U.S. 325, 96 S. Ct. 3001 (1976).	Woodson v. North Carolina 428 U.S. 280, 96 S. Ct. 2978 (1976).	STATUTES	Colorado Revised Statutes, 1973, as amended Section 16-11-103	Ohio Revised Code Section 2929.04

STATEMENT OF THE ISSUES

IS THE COLORADO DEATH PENALTY STATUTE WHICH PROVIDES FOR ADMISSION OF EVIDENCE AND JURY DETERMINATION OF AGGRAVATING AND MITIGATING FACTORS UNCONSTITUTIONAL FOR TOO NARROWLY PERMITTING CONSIDERATION OF MITIGATING FACTORS?

STATEMENT OF THE CASE

cial penalty Information -11 - 103Judia Theodore felony death Ninth 16 Statutes, the Criminal for the charging Class of Ø imposition and Direct Revised Murder C-1616) in Ø Court Degree Colorado by1976, No. conviction District Action First 26, imprisonment, October (Criminal with the amended nodn in Bundy On punishable filed as District life Robert 3, Was or

Was for cause Hearing held probable Bundy, Preliminary Robert found Court Theodore ď 1977, the 5, 1977, Defendant, and 9 4 April April the on o ordered and trial held and

States court and the Eighth United Motion 973, asking the the Q -103, filed of of Consideration, 16-11 violation Constitution Defendant Statute in from the Revised the unconstitutional, 1977, to Penalty Colorado Amendments 16, Death May that on the is Fourteenth find amended Strike ç

Defendant's of briefs granted and unconstitutional Court argument the considered the 1977, statute 27, December the Court holding on The and motions, counsel

sfy held sati Order .11 to Д rigid at and (Memorandum Opinion Opinion 100 is plan Memorandum sentencing = its standards. in Statutory Court constitutional The "Colorado's

Original Rule Ø granted this filed Court Petitioner Ø thi 1978, 7 197 2 January 30, On December on and Cause Proceeding Show 40

time decision granted of Wa on Petitioner Court the extensi reply to the Due its considerable 8 and file 197 reply 1978, 3, to July to 1978, 27, Q 8 decided after April 97 5, П 7 15 Julyon Respondents Ohio, July brief until > until their oner-Lockett granted Petiti filed in

recaptured from Extradition escaped Florida Richard Was and Bundy, of charges. Governor Askew • 1977 Robert 31, Governor and state Theodore December commenced faces t t tion on Mou defendant, been Н requisi he Jai have where County The his proceedings Florida sent has in

and custody Colorado in Mou not set is peen defendant has date The trial no

SUMMARY OF ARGUMENT

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THE COLORADO DEATH PENALTY STATUTE WHICH ALLOWS THE JURY TO HEAR EVIDENCE IN AGGRAVATION AND MITIGATION, PROVIDES ADEQUATE STANDARDS AGAINST WHICH TO MEASURE THE DEFENDANT"S RECORD AND CHARACTER THUS PREVENTING ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY.

ARGUMENT

the Ct. have Ct. mitigating 978 Q of phase Such ß Supreme ion which S 97 Ct. 96 second impos offender statutes 325 S and S 9 9 S D the aggravating U.S for 280, the the trial penalty 428 providing ana p_{X} ŝ and unconstitutional D Si. siana, bifurcated 428 Loui the offense death statute Loui ina 5 with erts Carol mandatory the > Ø specifically Roberts Robe Colorado establishes both North held Harry the to been > Stanilaus the relevant and Unlike Woodson deals tγ consistently 1933, (1977) penal 3001 (1976) of which factors (1976)Court, death

that Ct. the unbridled discretion ŝ 92 238, U.S. 408 Georgia, jury the | Furman from removes in condemmed (1972)procedure 2726

Supreme Court satisfying Fourteenth Amendments Furman, the them as and approved several opinions since and the Eighth statutes analyzed In of mandates has

1978) U.S. 'n (July out Ohio Jurek Gregg Proffit point 3229 Lockett v. and t t looked to 23CRL (1976), U.S. 242, 96 S. Ct. 2960 (1976) 2950 (1976), are 2909 supra, U.S. decisions ct. inadequacy of the Ohio statute. Ct. Ohio, Ohio 96 S. 96 S. most recent | <u>|-|</u> U.S. 153, Lockett and Bell 428 U.S. 262, The court in Florida, 428 3215, Georgia 428 23CRL The

found before Georgia, the court reviewed the Georgia the mandates approved broad aggravating factors court the factors be The satisfied with had enumerate mitigating factors. of mitigating evidence along Court statute which enumerates ten possible aggravating recommended Supreme direction. sentence could be statutory Georgia Gregg v. the and the not introduction that because guidance In that one of death

it this requirement would be satisfied interpretation admissable mitigating would clear and 1. 1. 1. mitigating factors is only and record character It is find similar Colorado jury to It of the mitigating imposed. מ introduction of found without character adopt a death penalty. the death penalty can be court evidence of ď argument, 13 permitting wide open Should this not necessary for interpretation the factor avoid a11 and aggravating virtually broad that 13

of penalty 5 consideration that factors Was factors finds statute death mitigating aggravating aggravating jury, the ţ Florida of court the six application of eight lists the the the vote outweigh limit Florida, and enumerates advisory for limited specifically factors > provided Proffit after statute is court mitigating Ιţ factors court, not In Florida which the examined. does the these but the if

Second, drawn 1.8 it otherwise be should capacity or sentence statute. distinctions statutory advisory Colorado death an factor, important in the the except o£ mitigating and application and jury statute clear Q by αl TWO this of bar applied finding does not between not

ф Ø $_{\rm IO}$ ٠, into of court Of back finding factors introduction jury the us meaningful what lead statutory mitigating (jury's) that surely the and court's therefore, in would latitude intelligent the and suggest, affect aggravating or wide impossible uncertainty make is may would here Would that instructions Н permitting pre-Furman otherwise statutory evidence

the allow effect to would statute evidence Colorado o. the introduction of Interpretation in latitude result, broad same

establish rather Texas not but examined in Jurek v. did factors, statute and mitigating Texas interrogatories: procedure The different. aggravating Texas three The considerably οĘ jury list the ď

expectation ther would committed defendant another Was reasonable or t of the d deceased conduct o of the de with the the result; (2) whether there of the death and death deliberately that the whether

violence that of vi a probability criminal acts ner there is would commit fendant

threat continuing ಡ constitute and would that woul society;

conduct if deceased was provocation, the 2955 whether at e evidence, w killing the the Ct ç S 96 response deceased." the in } if raised by the defendant in unreasonable the ρλ any,

individual the jury byquestion brought before the interpreted the 276 to at relating 2628, as that U.S. circumstance held 42 adduced". simply second mitigating court the can be The court, "whatever defendant

inter court safeguards state liberal and standards to looked adequate court the find Again to pretation

unconstitutional. · 1978) Be11 Ct. and S $^{\circ}$ i. July Ohio, 1978), held (decided > and 3, Lockett July statute Cr.L3229 (decided opinions penalty 23 Cr. L 3215, recent 76-6513, death Ohio most 23 No. The the 76-6997, Ct. examined ŝ Ohio No.

consideration in holding character death" that than offense concurred defendant's less precluded the sentence Justices of Ø it of circumstances as ď aspect 3220 four for invalid at basis of $an\lambda$ Cr.L.3215, plurality statute was the factor, ď as of proffers anyOhio, mitigating ď Ohio and Here ·| defendant record the Lockett that "as OL

statute the amended and Colorado admissable as 1973, the in evidence (5), factors 16-11-103, the mitigating consider Statutes, then the of Revised us applicability Let Colorado provide

- that sentence sentencing finding the the impose : if the or verdict in a verdictine offense: Of the defendant not shall the g results time of t was under court on The death hearing at the t He (a)
- constitute eighteen; or ate wrongfulness m his conduct to significantly t t e age ... appreciate wro impaired law was was under the s s capacity to al conduct or to 80 οĘ not requirements but impaired, a defense His his the (p) Of

or

prosecution;

to

in the offense, which er but his participation although not so minor as substantial or 4 o prosecution; in the off and such to pr another unusual titute a defense to He was a principal committed by anothe minor, not was under, although under relatively constitute duress, He <u>ပ</u> Was Was (q)

to prosecution;

defense

ď

constitute

He could not reasonably have foreseen that conduct in the course of the commission of offense for which he was convicted would se, or would create a grave risk of causing causing Of grave = another person. cause, or He (e) his the

defendant' ß hi grave criminal and bearing upon his a mitigating and d offense conduct" create of prior the education to the would his relevant οĘ in and of itself including the absence to another person" age, relevant as of "the commission cause, or appreciate wrongfulness His are these factors eighteen. would certainly ı. convicted forsee that While age causing death life, under all of LS. in are All "capacity to which he was if he experience t t character. activity, ability of onlyrisk

peen out criteria follows: has set one are of as These after Code a set penalty Revised statute provides aggravated murder. death Ohio the the of Ohio imposition of οĘ 2929.04 The guilty section found for

a capital offe...

the death penalty for

is precluded, unless

he following is specified

number of the section 2941.14 proved Criteria for the Q murder e of the οĘ and indictment doubt: ç for Imposition pursuant Code, "\$2929.04 Cri imprisonment more aggravated reasonable ment pur Revised the or one (A)in

election petition or purpose person general offices. election trial States, his the United States or persion to the presidency, contoured governor of of committed orperson writehire. for the United Sta Ø have of the governor or lieutenant governor this state, or of the president-elect vice president-elect of the United State or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing off the or filed apprehension, offense comm. nominated the foregoing division, a pe primary e in a primary or general offense was committed for offense was committed for ç a S has to law campaigns he ď been r if h he law, or if r according to was the another primary detection, succession of the c any of of this he i.f offense for president the purposes didate if lording to offender. in according to or petitions or of escaping or punnishment the off or candidate on election, candidate line the g The or peti placed For the in

- offender the purpose Code, conduct attempt convicted to kill victim was engaged offender knew another, Revised offense, the law while the facility bar, se of such, and elther; duties at the time of the offens; the offender's specific purpose enforcement officer. or e was a la offender has previously been which the gist was t e gist was to kill an of course the the at Was the purposeful killing þλ attempt to ki committed detention e persons by of ď the a dec... n 2921.01 οĘ whom the c part officer who and either ill two or more The victim of the Was to section bar was in or in section of sections of sect od prior was a prisoner defined in sect offense two enforcement involving to kill two committed The offense his Was law ful (9) i, to it
- indictment condition offender r fleeing of death following commit, or flee r attempting to burglary. more of the in division (preponderance) Jo able doubt, the d der is precluded circumstances of arson, the and the character, more of the in aggravated kidnapping, rape, aggravate ted robbery, or aggravated rardless of whether one or r circumstances listed specified or reasonable ç murder attempting to more prepondence and the history, or aggravated the nature ı. nature one section Ø committing, at diately after proved beyond offender, Regardless bγ aggravating (A) of this for established immediately and considering aggravated (B) Regardl evidence: The penalty offense the commit Was and (7) of
- facilitated or induced offense the victim of
- been Was though the have would have coercion, or strong provocation e was primarily the product of deficiency, to establish the offense that mental insufficient ; the fact that or the condition is in unlikely, but for (2) It is unlikel committed, but for under duress, coe (3) The offense v offender's defense such

seven of

three individual participation here, does last these factors are the aggravating Was felony The likewise seen killing capacity Q readily be the offense. in H though the complicator defendant nor his minor. actions. can of the offender. As it participation was even nature his of Ø 1.8 account of the death penalty who the the the wrongfulness one to take of which pertain that age focused upon the The first do not or his the 80 crime, avoid consider factors foreseeable appreciate the cannot not are i,

held court the limitation, this to regard In

mitigating the the some purposes he sentencing 3221. of in that pe speds death of role would generally not to affect the senten .L. 3215 at 3221. three statutory consideration proof for mitigating 's comparatively minor ror age, would generally such, to affect +it t the that direct cause determined οĘ to factors. Similarly, defendant's comparatoffer. the intended relevant t is deter absence or The it g = defendant victim is offense, mitted, a decision. i.f only i light

Justice Mr Mr. pungent. of opinions even more concurring are White the respect, Justice states: this Blackmun and Mr. In Blackmun Justice

view, require, degree course if any reason manageable alternative, in har requirelow a proceduralist tact, and requirelow a proceduralist tact, and requirelow a proceduralist tact, and requirely and the sentencing authors. character of A defendant acts the cour al force or fired, in the c the ou · · A dele evidence, fatal in or pe t's participation homicide and the part of f little would rea. . o adduce use minor dnu the th as Lockett, the have discretion defendant's parti leading to the ...
the defendant's mens r t that he ď only a Ø leading to that available, t anticipate t at he played 3215, more man ofollow does events such Ohio thority that he t t man i.s be as of of

provides It involvement" case Lockett deficiency the "minor such in and consideration suffer result not "unforeseeable" does prime Colorado ർ

CONCLUSION

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and Revised constitutional Colorado absolute. that 13 be made as amended submitted should is therefore 1973, case 16-11-103, this It 1.8 rule Statute the

Respectfully submitted,

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Deputy District Attorney for the
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CERTIFICATE OF MAILING

80203, of of the 81611 and the Supreme Court the State of Colorado, 2 E. 14th Avenue, Denver, Colorado Glenwood Springs, George E. Lohr, District Court Judge, Pitkin copyI hereby certify that I have mailed a foregoing to Kevin O'Reilly, Box 1635, day of July, 1978. County Courthouse, Aspen, CO JEM 81601, Hon. this

Mican (2002)